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No. 84-106

In The

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

vs.

CLAUS VON BULOW,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Pages

TABLE OF CASES i

ARGUMENTS:

I. Respondent's Treatment of the State Law Issue Is Designed to Mislead the Court. 1

II. Respondent's Brief Misrepresents the State Court's Disposition of the Evidentiary Privilege Issue. 4

III. Respondent Improperly Attacks the Jury's Verdict. 5

IV. Respondent Eschews Any Privacy Interest in the Black Bag or its Contents. 7

CONCLUSION 10

TABLE OF CASES

Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931) 2

Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979) 9

Chapman v. California, 386 U.S. 18 (1967) 3

Florida v. Gans, No. 83-409 (Dist. Ct. App. July 19, 1984) 10

Herb v. Pitcairn, 324 U.S. 117, 126 (1945) 2

Louisiana v. Gentry, No. 84-k-162 (La. Ct. App. May 15, 1984) 10

Martin v. Hunter's Lessee, 1 Wheat. 303 (1816) 1

Murdock v. City of Memphis, 87 U.S 590, 634 (1873) 2

Nix v. Williams, 104 S.Ct. 2501, 2509 n.4 (1984) 3

State v. Beaulieu, 116 R.I. 575, 359 A.2d 692 (1976) 4

State v. Benoit, 417 A.2d 895 (R.I. 1980) 3, 4

State v. Lemon, 256 A.2d 262, 264 (R.I. 1983) 4

State v. Robalewski, 418 A.2d 817 (1980) 3

TABLE OF CASES—Continued

Pages

United States v. Jacobsen, 104 S.Ct. 1652 (1984) 8, 9, 10

United States v. Leon, 104 S.Ct. 3405, 3413 (1984) 8

Williams v. Georgia, 349 U.S. 375, 399 (1955) 2

I. Respondent's Treatment Of The State Law Issue Is Designed To Mislead This Court

von Bulow bases his attack upon the Petition for Certiorari on the presumption that this Court lacks jurisdiction to issue a writ. The core of von Bulow's argument is the baseless allegation that Petitioner has misrepresented both the law and facts in an attempt to deceive this Court. A reading of von Bulow's brief in opposition reveals that if anyone is attempting to mislead this Court it is not the Petitioner—it is von Bulow himself.

Lest there be any doubt, the Petitioner recognizes the right, power, and authority of any state court to base its judgments upon principles of state law. Petitioner does not gainsay this important component of our federalism. Petitioner also recognizes the important corollary, however, which von Bulow ignores in his subtle attempt to distract this Court: it is the role of this Court to determine when and whether a proffered state law theory adequately and independently supports the judgment of the state court. In this regard von Bulow's pious invocation of "state's rights" constitutes an attempt to divert this Court from its important role as arbiter of the overlapping —sometimes antagnostic—interests at work in our federal system. Whatever the independence and autonomy of the states in our federal system, the federal constitution preserves this Court's jurisdiction to correct State Court judgments based upon erroneous decisions of federal law.

In implementing its role as the final arbiter of federal law this Court has long recognized that issues of federal law arising in actual cases may frequently be intertwined with related issues of state law. *See Martin v. Hunter's Lessee,* 1 Wheat. 303 (1816). In such cases, where the state law issues "are not of such controlling influence on the whole case that they are alone sufficient to support

the judgment," *Murdock v. City of Memphis*, 87 U.S. 590, 634 (1873), this Court will take jurisdiction to review the errors of federal law. To the extent that the state court incorrectly adjudges federal rights, it is the province of this Court to examine and to correct the state court judgment. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

The essential preliminary jurisdictional question is whether the asserted state law ground sufficiently supports the lower court judgment. The answer to this question is undeniably a matter of *federal* constitutional law that must be determined by this Court:

> "[T]he federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the State court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931).

See Williams v. Georgia, 349 U.S. 375, 399 (1955) (Clark, J., dissenting) (state courts cannot invoke state principles to evade federal law; even colorable state decisions must give way when they interfere with federal principles).

Despite von Bulow's misleading characterization of the issues in this case, Petitioner in no way disparages the power of a state court in our federal system to render judgments based on state law. Petitioner merely submits that in this case the state court did not base its judgment on an adequate, independent state law foundation. The exclusively federal basis for the judgment is abundantly clear from a reading of the court's opinion; the Rhode Island court held that purported errors of *federal* law mandated that "defendant's conviction must be reversed." App. at 47. Conversely, the state court's discussion of state law led not to a reversal of the conviction but only

to a collateral reason for the suppression of certain evidence. The court neither stated nor implied that state law required reversal of von Bulow's conviction. Such a judgment of reversal could only be based, under *Rhode Island state law*, upon a finding that the failure to suppress was *both* erroneous *and* harmful under the appropriate state standard.[1] *State v. Benoit*, 417 A.2d 895 (R.I. 1980); *cf. Nix v. Williams*, 104 S.Ct. 2501, 2509 n.4 (1984) (harmless error analysis is necessary to ensure that convictions are set aside only for errors that have a measurable effect on the trial). Respondent's misleading allegations to the contrary nothwithstanding, a reading of the state court's opinion clearly reveals that the court never undertook such a state law harmless error analysis.[2] It

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[1] von Bulow desperately attempts to convince this Court that the Rhode Island Supreme Court actually undertook a state law harmless error analysis. Resp. Opp. at 14. von Bulow concedes that the only harmless error discussion in the opinion appears in the court's discussion of federal law. *Id.* The cases cited by the state court are federal cases, *e.g., Chapman v. California*, 386 U.S. 18 (1967) or Rhode Island cases involving strictly federal precedents. *E.g., State v. Robalewski*, 418 A.2d 817 (1980). The *von Bulow* court specifically described *Robalewski*, for example, as a case involving the *federal* harmless error rule. App. at 35. As if conceding the failure of the state court to support its judgment with state law, von Bulow attempts to fill the gap by concocting an analysis that von Bulow considers desirable. Resp. br. 16-18. von Bulow is essentially asking this Court to infer an interpretation of state law that simply does not exist on the face of the state court's opinion. Ironically it is von Bulow, not Petitioner, who thus asks this Court to create an interpretation of *state* law that defeats its jurisdiction. Petitioner suggests that such an exercise is an unnecessary intrusion into the interpretation of state law. Rather than meet von Bulow's argument with a lengthy exposition of relevant state cases, *e.g., State v. Benoit*, 417 A.2d 895 (R.I. 1980), Petitioner merely suggests that von Bulow's concession that the state court failed to address these points clearly demonstrates that the lower court's judgment is not supported by an adequate state law bases.

[2] Petitioner hesitates to draw this Court into a discussion of state law. Nevertheless, von Bulow's misrepresentation of

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is therefore clear that the asserted state law basis fails to support the state court's judgment. Accordingly, this Court has jurisdiction to grant a writ of certiorari.

II. Respondent's Brief Misrepresents The State Court's Disposition Of The Evidentiary Privilege Issue

von Bulow falsely claims that the Rhode Island Supreme Court found a separate evidentiary privilege issue "dispositive" of his conviction. Resp. Opp. at 6-7. In fact, the court held that it would have remanded the case for further proceedings on this issue. The court specifically stated that this remand was "precluded" by the court's disposition of the search and seizure issue. App. at 31. In view of the court's clear and unambiguous statement that the only issue requiring reversal of the conviction was the Fourth Amendment claim, App. at 31, von Bulow's representation that the evidentiary matter was "dispositive" is manifestly false.[3]

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Petitioner's arguments requires a brief exposition of Rhode Island appellate jurisprudence. von Bulow implies that the court intended to base its judgment on state law and that Petitioner subverts the state court's purpose and federalism itself by seeking review in this court. Petitioner seeks nothing of the kind. Rather, petitioner suggests that the Rhode Island Supreme Court simply failed to support its judgment with an adequate and independent state law basis. The Rhode Island court was well aware that to do so would require a state law harmless error analysis. *See, e.g., State v. Benoit,* 417 A.2d 895 (R.I. 1980). Petitioner suggests that the court's discussion of the non-dispositive state constitutional issue was consistent with the Rhode Island Supreme Court's well-known practice of discussing on direct appeal significant non-dispositive issues that are likely to arrise in later proceedings of the same and other cases. *See, e.g., State v. Lemon,* 256 A.2d 261, 264 (R.I. 1983) (when new trial granted, court may discuss other non-dispositive issues that are likely to arise again); *State v. Beaulieu,* 116 R.I. 575, 359 A.2d 692 (1976) (non-dispositive issues will be discussed by court in cases where new trial has been ordered and issues may arise in future).

[3] The within petition does not question the propriety of a remand for further inquiry regarding the evidentiary privilege

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III. Respondent Improperly Attacks The Jury's Verdict

Accusing Petitioner of misrepresenting the facts of the case, von Bulow proceeds to argue to this Court that the facts at trial support his innocence. This cynical attempt to impeach the verdict of the jury is especially ironic in light of the Rhode Island Supreme Court's adamant rejection of von Bulow's evidentiary insufficiency argument.[4] If von Bulow seriously questioned the sufficiency of the evidence to prove his guilt, he could have cross-petitioned for certiorari and asked this Court to review the evidentiary record. Instead, he waives this issue, seeking by subterfuge to attack the jury's verdict and the Rhode Island Supreme Court's condemnatory view of the extensive evidence of his guilt.

As if this were not enough, von Bulow's appellate counsel actively misleads this Court with a fictitious account of facts allegedly suggesting his innocence. Resp. Opp. at 4-5 n.4. Because von Bulow's factual deceptions are subtle and calculated, Petitioner cannot, in the limited space available, refute them all. A few examples must suffice. For instance, von Bulow attemtps to show his

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issue. Indeed, Petitioner recognizes that if this Court grants the writ and reverses the judgment of the Rhode Island Supreme Court, this Court would then likely remand the case directly to Newport Superior Court for disposition of the evidentiary privilege issue. This limited remand would focus only upon the narrow question whether certain allegedly privileged materials are actually entitled to the protection of privilege. The trial judge would also be required to determine whether any relevant evidence is contained within the documents. von Bulow's mendacious characterization of this issue as "dispositive" of his conviction can only be intended to mislead this Court.

[4] The Rhode Island Supreme Court concluded that the evidence supported a conclusion, beyond a reasonable doubt, that von Bulow had taken a syringe containing insulin and "injected the contents of the syringe into his wife with the intent that she should expire . . ." App. 53.

loving concern for his wife's health with the following assertion:

> "On four or five occasions when Martha von Bulow was critically ill during 1979 and 1980, Claus von Bulow was the first to call the doctor." Resp. Opp. at 4.

This statement is misleading, because one of the cited occasions was von Bulow's first attempt to murder his wife. Mrs. von Bulow remained comatose for many hours while von Bulow steadfastly refused to seek medical help. von Bulow finally capitulated and summoned a doctor, but only after Mrs. von Bulow's maid expressed her suspicions and threatened to call the doctor herself. On another occasion cited to show his concern for his wife, von Bulow in fact had failed to telephone Mrs. von Bulow's personal physician. This doctor later testified that he could have treated Mrs. von Bulow at home, but her husband, by calling another doctor instead, transported her to a different hospital where she was prevented from seeing her personal physician for many hours. (Tr. XVII-2310).

von Bulow thus renews his clever attempts to appear the devoted husband while actually interfering with the medical care of his wife. This approach is consistent with his active campaign to slander his wife and impede her recovery by distorting her medical history.[5] Despite the

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[5] See Resp. Opp. at 4 n.4. Testimony at trial exposed von Bulow's carefully orchestrated plot to convince his wife's physicians that she was an alcoholic who abused barbituates. For example, von Bulow told the family physician, Dr. Stock, that his wife's first coma was caused by alcoholism. (Tr. XVII-2300). This claim was also made to the physician treating Mrs. von Bulow in Newport. (Tr. XV-1709-11). In fact, laboratory tests at Newport Hospital revealed that upon admission Mrs. von Bulow's alcohol and barbituate levels were negative. (Tr. XV-1728-29). Her personal physician, who is an expert in alcoholism, testified that in twenty-six years of treatment his patient had displayed none of the clinical signs of alcoholism. (Tr.

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jury's obvious disbelief of this subterfuge, von Bulow persists in his attempt to mislead this Court.

Another example of von Bulow's cavalier attitude toward the facts is his vague allegation that "mistakenly" identified items would prove that the black bag belonged to his wife. Resp. Opp. n.4. This is clearly contradicted by the fact that in February of 1980, when Maria Schrallhammer first observed the bag, she saw a prescription bottle in the name of Leslie Baxter—a name unknown to Maria. (Tr. VIII-366-67). von Bulow *stipulated* at trial that these drugs had been given to *him*—not to his wife—by Ms. Leslie Baxter, a female associate of von Bulow's. (Tr. XX-2988). This conceded confirmation of Maria's observations both supports her credibility and refutes von Bulow's present innuendo that the black bag belonged to his wife.

Given von Bulow's concession that he no longer challenges the sufficiency of the evidence against him, Resp. Opp. at 3, his contorted account of the facts is especially inappropriate. Petitioner is confident that this Court will not permit him to benefit from these distortions.

IV. Respondent Eschews Any Privacy Interest In The Black Bag Or Its Contents

Perhaps the most remarkable aspect of von Bulow's opposition to certiorari is his brief's deafening silence regarding his privacy interest. Nowhere in the twenty-four page document does von Bulow even suggest that he had a reasonable expectation of privacy in either the black bag or its contents. It is replete with repudiations of any

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XVII-2285-2292). Moreover, two of von Bulow's *own defense witnesses*, the butler at Clarendon Court and the family chauffeur, testified that they had never seen Mrs. von Bulow drink to excess. (Tr. XX-3051, 3066, 3101). In the face of this extensive evidence that von Bulow's claims of his wife's alcoholism were false, he persists in his attempts to deceive this Court.

privacy interest in the black bag. For example, at one point von Bulow suggests that all members of the household had free and equal access to the bag. Resp. Opp. at 4 n.4. Such an assertion defeats von Bulow's personal privacy claim. More important, it confers upon Alexander—the person who provided the bag to police—an apparent right to consent to the chemical tests conducted by police. This view of the facts, of course, obviates the need for a search warrant. Later in his brief von Bulow implies that when Alexander delivered the bag to Sgt. Reise, the police should not have believed that the bag belonged to von Bulow. Resp. Opp. 6 n.4. This duplicitous position chastises the police for even suspecting that the bag belonged to von Bulow; at the same time von Bulow criticizes the police for failing to protect his expectation of privacy—an expectation of privacy that he seeks now to abandon! Given this *reductio ad absurdum* of von Bulow's argument, application of the exclusionary rule in this case invites public mockery of the law and the administration of justice. *See United States v. Leon*, 104 S.Ct. 3405, 3413 (1984) (indiscriminate application of exclusionary rule invites public disrespect for law).

In support of his claim that the Rhode Island Supreme Court properly applied *Jacobsen*, von Bulow quotes at length from the Rhode Island court's opinion. Opp. 20-21. *Jacobsen*, of course, requires a reviewing court to evaluate police conduct in light of prior private conduct. The Fourth Amendment comes into play only to the extent that the private search leaves uncompromised some cognizable privacy interest. von Bulow suggests that his expectation of privacy remained intact despite the private search. In making this argument von Bulow notes that the Rhode Island court placed great importance upon Sgt. Reise's purported ignorance of two

items found in the black bag—papaveretum and lidocaine. Reise's alleged ignorance regarding these substances is proffered to show that von Bulow had some lingering privacy interest that was infringed by testing that confirmed the identity of these items. Rather than supporting von Bulow's position, however, this lengthy quotation from the opinion vividly reveals the Rhode Island court's misapplication of *Jacobsen* to the facts of this case. Uncontradicted testimony showed that both the lidocaine and papaveretum were *clearly labelled* as such. (Tr. IV-667-668). A labelled item plainly declares its contents. Because private parties and police alike had clearly inferred the identity of the contents from outward appearances, the papaveretum and lidocaine supported no reasonable expectation of privacy. *See Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979). Moreover, von Bulow's trial counsel *conceded* that Reise was free to examine items and to read their labels *without implicating any Fourth Amendment rights. See* Pet. at 12 n.6. Clearly, under proper Fourth Amendment analysis these items supported no expectation of privacy. That the *von Bulow* court focused upon these substances—items that von Bulow himself essentially *conceded* supported no expectation of privacy—demonstrates the court's misapplication of *Jacobsen* to the facts of this case. Presumably, this is the best support von Bulow can find for his claim that the court below adequately applied the principles enunciated by this Court in *Jacobsen*. Petitioner submits that the quotation shows exactly the opposite and provides an ample basis for this Court to exercise certiorari jurisdiction.[6]

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[6] The jurisdiction of this Court is based, in part, upon Petitioner's claim that the Supreme Court of Rhode Island decided this case in conflict with the decisions of high courts of other States. Pet. at 2 & n.2. In addition to those cases cited

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CONCLUSION

For the foregoing reasons, and for such other reasons as appear on the Petition for Certiorari, the State of Rhode Island and Providence Plantations prays that a writ of certiorari issue to the Supreme Court of Rhode Island.

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in the Petition, Petitioner wishes to apprise this Court of two state cases decided after *United States v. Jacobsen*, 104 S.Ct. 1652 (1984). In *Florida v. Gans*, No. 83-409 (Dist. Ct. App. July 19, 1984), the trial court suppressed the results of a chemical analysis conducted by police. The defendant had been a patient in a hospital emergency room, where admitting personnel removed items from his pockets, including a vial containing white powder. Suspecting illicit drugs, the hospital summoned the police and a chemical test was conducted, which confirmed the presence of cocaine. The court held that the private observations by hospital officials had so vitiated defendant's privacy interest that the subsequent warrantless police chemical test was permissible. In *Louisiana v. Gentry*, No. 84-k-162 (La. Ct. App. May 15, 1984), the employees of a freight carrier observed a suspicious package which, when opened, revealed a plastic tape cassette cartridge filled with white powder. Police were summoned and chemical tests ensued. The Court concluded that the private observation of the powder substantially compromised defendant's expectation of privacy. The subsequent chemical analysis therefore implicated no Fourth Amendment rights. Petitioner submits that the Rhode Island Supreme Court's decision in *von Bulow* conflicts with the holdings of these cases. As such, they provide a basis for certiorari pursuant to Sup. Ct. R. 17.